

ESTATE OF AARON FRANCIS WALTER

IBIA 88-21

Decided August 17, 1988

Appeal from an order after reopening issued by Administrative Law Judge Keith L. Burrowes in Indian Probate No. IP BI 26A 83-1.

Affirmed; recommended decision adopted.

1. Indian Probate: Inventory: Property Erroneously Excluded or Included

In order to be successful in a legal challenge to the inventory of a deceased Indian's trust or restricted estate prepared by the Bureau of Indian Affairs, it is necessary to establish by a preponderance of the evidence that Bureau employees either did something they should not have done, or did not do something they should have done, and that such error or omission was responsible for the transaction not being completed during the life of the decedent.

APPEARANCES: Ross W. Cannon, Esq., Helena, Montana, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

On March 21, 1988, the Board of Indian Appeals (Board) received a notice of appeal and brief on appeal from the Estate of John Walter

(appellant). 1/ Appellant seeks review of a February 18, 1988, order after reopening issued by Administrative Law Judge Keith L. Burrowes in the estate of Aaron Francis Walter (decendent). 2/ For the reasons discussed below, the Board affirms that order, and adopts Judge Burrowes' recommended decision.

Background

Decendent, Allottee 3410 of the Blackfeet Indian Reservation, Montana, was born on September 12, 1912, and died intestate on June 8, 1982. Judge Burrowes held a hearing to probate decendent's trust and/or restricted estate on May 26, 1983. The evidence adduced at the hearing showed that decendent's heirs included 4 brothers and sisters and 19 nieces and nephews.

Appellant, who was one of decendent's brothers, filed a claim against the estate for \$11,000. Appellant alleged he had paid that amount to decendent in exchange for a gift deed to part of decendent's trust estate, namely, Lots 1 and 2, W $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$, E $\frac{1}{2}$ NE $\frac{1}{4}$ of sec. 7, T. 36 N., R. 11 W., Principal Meridian, Montana, containing 315.5 acres, more or less. Appellant's attorney made an offer of proof to the effect that decendent had agreed to sell the property to appellant; a purchase price of \$11,000 had been agreed upon; the money was paid to decendent; decendent filed a gift deed application with the Superintendent, Blackfeet Agency, Bureau of Indian Affairs (Superintendent; BIA); decendent's brother,

1/ John Walter originally brought this suit, but died before it was concluded. His estate was substituted as appellant. The term "appellant" is used to apply both to John Walter personally and to his estate.

2/ Decendent was apparently also known as Bill Walter.

Thomas, visited the agency and inquired about the adequacy of the purchase price for the property; 3/ BIA interpreted this inquiry as a question concerning decedent's competence; BIA began an investigation of decedent's competence; the investigation was not completed when decedent died; the property was never conveyed to appellant, but was included in decedent's estate at the time of his death.

At the close of the hearing, Judge Burrowes granted a continuance of the proceeding in order to allow the family members an opportunity to discuss the situation and perhaps reach an agreement in regard to the disposition of the disputed tract. No settlement was reached. During the time the proceeding was continued, however, appellant obtained additional information from BIA concerning the processing of decedent's gift deed application. This information was included in the probate record.

Judge Burrowes issued an order in decedent's estate on January 14, 1985. He found the evidence showed decedent and appellant agreed upon a purchase price of \$11,000 for the property; on May 21, 1981, this amount was paid by appellant to decedent and was deposited into decedent's account in the First National Bank of Browning; and also on May 21, 1981, an application for a gift deed was filed with the Superintendent. The Judge further found decedent was residing in a nursing home when the transaction was discussed, and left the nursing home to prepare the gift deed application and

3/ The record indicates that \$11,000 was considerably below the estimated value of the property which BIA provided to Judge Burrowes for probate purposes.

present it to BIA. Decedent then returned to the nursing home, where he remained for only a few days before moving to the home of his brother, Thomas. He remained with Thomas until returning to the nursing home shortly before his death.

In his order, Judge Burrowes held he did not have authority to review BIA's inventory of a deceased Indian's trust or restricted estate. He granted appellant's claim against decedent's estate for \$11,000, the amount paid to decedent for the property. The disputed property remained in decedent's estate, and was distributed to his heirs, including appellant. 4/

On March 11, 1985, appellant filed a petition for rehearing, alleging that the gift deed should have been retroactively approved in accordance with the Board's decision in Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 21, 89 I.D. 655 (1982), because BIA had negligently failed to process the application. Appellant noted decedent lived for over a year after the gift deed application was filed.

By order dated May 30, 1985, Judge Burrowes denied appellant's motion, stating that this same argument was raised and decided against appellant in the original proceeding. Appellant did not appeal this order to the Board, but on July 3, 1985, filed a motion to reconsider with Judge Burrowes. This

4/ Appellant received an undivided 1/8 interest in all of decedent's trust or restricted property, including the tract at issue here.

motion was based upon the Board's decision in Estate of Douglas Leonard Ducheneaux, 13 IBIA 169, 92 I.D. 247, decided on May 31, 1985. ^{5/} Ducheneaux, held that Departmental regulations in 25 CFR Part 2 and 43 CFR Part 4, Subpart D, were adequate to give Administrative Law Judges hearing Indian probate cases the authority during the probate proceeding to take evidence concerning alleged erroneous inclusions or omissions of property from BIA's inventory of a deceased Indian's trust or restricted estate and to issue a recommended decision concerning the property that should be included in the decedent's estate.

By order dated August 9, 1985, Judge Burrowes reopened decedent's estate. An additional hearing was held on August 28, 1985. Evidence was taken at that hearing concerning BIA's usual practice in reviewing gift deed applications and the particular circumstances surrounding the gift deed at issue here. Conflicting evidence was also presented concerning decedent's competency during the last years of his life.

On February 18, 1988, Judge Burrowes issued an order reaffirming his original order and holding there was insufficient evidence to allow him to recommend that the property at issue be removed from decedent's estate and transferred to appellant.

^{5/} Ducheneaux was appealed to Federal court on another issue. The Board's standing order, considered in the present case, was not addressed on appeal. See Ducheneaux v. Secretary of the Interior, 645 F. Supp. 930 (D.S.D. 1986) (rev'g the Board on other grounds); rev'd, No. 87-5024 (8th Cir. Jan. 26, 1988); cert. denied, 486 U.S. 1055, 56 U.S.L.W. 3848 (June 13, 1988).

Discussion and Conclusions

The proceeding allowed under the Board's standing order in Ducheneaux provides an opportunity for a Departmental judicial officer to consider a legal challenge to the inventory of a deceased Indian's trust or restricted estate at an early point in the proceedings. ^{6/} This inventory is prepared by BIA and provided to the Administrative Law Judge for use in the probate proceeding. The procedure contemplated in Ducheneaux is, admittedly, a hybrid, allowing consideration of a BIA administrative action within the context of a probate case. Consideration of BIA administrative actions would normally follow the procedures set out in 25 CFR Part 2 and 43 CFR 4.330-4.340. Consequently, Ducheneaux requires the Administrative Law Judge to inform the BIA officials who would normally be involved in a proceeding under 25 CFR Part 2, of the challenge to the inventory. In cases raising a Ducheneaux challenge, the Judge's final order in the estate will include a recommended decision on whether or not the inventory should be altered. That recommended decision is final unless appealed to the Board. ^{7/}

^{6/} Provisions for administrative corrections to the inventory are found in 25 CFR 150.7 and 43 CFR 4.272-4.273. Administrative corrections most frequently result from errors in the description of property or errors or backlogs in recordkeeping, such as the failure to note that a decedent owned trust or restricted property under the jurisdiction of a second or third agency or to record transactions occurring during the decedent's lifetime.

In distinction, legal challenges to the inventory result from an allegation that BIA either took or failed to take some action with respect to trust or restricted property that either resulted in property being in the decedent's estate that should have been transferred to another person, or in property not being in the decedent's estate that should have been transferred to the estate.

^{7/} As discussed in detail in Ducheneaux, in the absence of the Board's standing referral order, cases raising legal challenges to the estate inventory would proceed as follows: The challenge would be raised to the Administrative Law Judge during the probate proceeding. Because the Judge

[1] Judge Burrowes here properly determined that the challenge presented to him fell within the standing order in Ducheneaux, and allowed full presentation of evidence concerning the transaction at issue. He stated his understanding of what Ducheneaux required at page 2 of his February 18, 1988, order:

In order to be successful in a challenge to an inventory it is necessary to establish that agency employees either did something they should not have done or did not do something that they should have done, and that such error or omission was responsible for the property not being taken care of during the life of the supposed grantor.

The Board agrees with this statement of the required proof, but with the modification that such error or omission was responsible for the transaction not being completed during the life of the decedent. The decedent may have been either the grantee or the grantor in the transaction. The Board adds that the proper standard of proof in these cases is a preponderance of the evidence.

fn. 7 (continued)

would not have authority to consider the challenge at that point, the issue would remain unaddressed, both in the evidence taken at the hearing and in the Judge's order. Any petition for rehearing on the inventory question would have to be denied. On appeal to the Board, it is almost certain that factual issues would need to be addressed. Therefore, the Board would have to refer the matter to an Administrative Law Judge for an evidentiary hearing and recommended decision in accordance with 43 CFR 4.337(a). Following an additional hearing and order, it is still conceivable that the matter would have to be referred to the Assistant Secretary--Indian Affairs under 43 CFR 4.337(b), if the discretionary approval of a deed remained at issue. See Estate of Arthur Wishkeno, 8 IBIA 147 (1980). This cumbersome procedure is not conducive to the efficient and effective use of judicial time, is excessively burdensome to parties and witnesses, and ensures that probate will not be concluded for several years.

Here, Judge Burrowes found BIA records indicated a question of decedent's competency arose a few days after the gift deed application was filed, and a competency evaluation was requested. That evaluation was not completed. He further found there was a backlog of gift deed applications on file at the agency and no evidence was presented indicating there was anything unusual about the length of time for processing decedent's application, or that decedent's application was treated differently from other similar applications. Accordingly, he concluded there was insufficient evidence for him to recommend that the property at issue be transferred from decedent's estate to appellant. In terms of the required proof, Judge Burrowes held appellant had not shown by a preponderance of the evidence that BIA officials failed to take actions they should have taken in order for the transaction to have been completed during decedent's lifetime. 8/

Based on its review of the record, the Board agrees with Judge Burrowes' conclusion and hereby adopts his recommended decision. 9/

8/ This holding does not condone the length of time this application was pending. It does recognize that BIA agencies have a large workload, are frequently short-staffed, and backlogs occur. Without a showing that this delay was significantly longer than those occurring with other similar cases, the Board cannot say the transaction should have been completed earlier.

9/ Assuming arguendo that BIA should have completed the processing of decedent's gift deed application sooner, such a conclusion would not result in the Board's approving the deed retroactively, as appellant argues. If this conclusion had been reached, the Board would be required under 43 CFR 4.337(b) to refer this matter to BIA for the exercise of its discretion in determining whether or not the deed should be approved retroactively. See Estate of Arthur Wishkeno, supra; Wishkeno, v. Deputy Assistant Secretary, supra.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the February 18, 1988, order of Judge Burrowes is affirmed, and his recommended decision adopted.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge